4-20-1976

Hazel Wilkerson, individually and as executrix of the estate of Walter Wilkerson, and Workmen's Compensation Board of Kentucky v. United States Steel Corporation; and George R. Wagoner, Commissioner of Labor and Custodian of the Special Fund

Appellee's Brief 1976-SC-0069

APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

File No. 76-69
WCB No. 911884

HAZEL WILKERSON, Individually and as Executrix of the Estate of Walter Wilkerson, and
WORKMEN'S COMPENSATION BOARD OF KENTUCKY - - - - - - - **Appellants**

versus

UNITED STATES STEEL CORPORATION and
GEORGE R. WAGONER, Commissioner of Labor and Custodian of the Special Fund - **Appellees**

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE JAMES C. BROCK, JUDGE

BRIEF FOR APPELLEES

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Pursuant to RAP 1.250 true copies of this brief were mailed to Smith & Carter, P. O. Box 710, Harlan, Kentucky 40831; Honorable William L. Huffman, Director, Workmen's Compensation Board, Frankfort, Kentucky 40601; and to Honorable James C. Brock, Judge, Harlan Circuit Court, Harlan, Kentucky 40831, on this 19 day of April 1976.

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STATEMENT OF QUESTIONS PRESENTED

The questions were correctly stated by Appellants.

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v.

UNITED STATES STEEL CORPORATION and GEORGE R. WAGONER, Commissioner of Labor and Custodian of the Special Fund - - - - - - - - - *Appellees*

BRIEF FOR APPELLEES

May it please the Court:

Unless otherwise apparent or indicated, throughout this brief numbers in parentheses standing alone refer to pages in the record as indexed by the Harlan Circuit Court Clerk, and emphases in quoted material have been supplied by the writer. Appellant Hazel Wilkerson, individually and as Executrix of the Estate of Walter Wilkerson, is usually referred to as claimant.

ARGUMENT

1. Falcon Coal Company v. Sweet, Ky., 518 S. W. 2d 343 (1975) Has No Bearing on the Case at Bar.

In *Falcon Coal Company* the employee last worked June 3, 1972, when *KRS* 342.111(1) provided in part as follows:

> "When an employee, *who has been awarded disability compensation* by the Workmen's Compensation Board, shall die from any cause, *whether or not related to the injury or occupational disease,* prior to the payment to him of the amount of the award, then the dependents of the deceased employee shall be allowed and paid all allowed and unpaid awards made to such employee."

In *Falcon Coal Company* the question was whether that statute was applicable, since the employee had not actually received an award at the time of his death, though he had filed for compensation. The Court of Appeals held that the timely filed claim was sufficient to make *KRS* 342.111 applicable.

However, when the employee in the case at bar last worked, *KRS* 342.111 permitted recovery of the balance of compensation *only* when death was "a result of such injury or occupational disease." Of course the law in effect as of the date the employee last worked controls (*Trimble* v. *United Fuel Gas Company, et al.,* Ky., 481 S. W. 2d 658 (1972), so that clearly *Falcon Coal Company's* holding that *KRS* 342.111 applies where timely claim is filed is of no benefit to claimant, since that statute as it existed

prior to 1970 when the employee in the case at bar last worked does not permit recovery of the balance of an award even if death is not related to the injury or occupational disease but rather requires that death be the result of the injury or occupational disease.

2. There is No Evidence to Support the Board's Finding of Fact That Pneumoconiosis "Was a Work Connected Causative Factor" in the Employee's Death.

The award for death benefits in this case was based on a Finding of Fact with reference to the decedent, Walter Wilkerson, that "the occupational disease of pneumoconiosis and/or silicosis arising out of and in the course of his employment as a coal miner, was a work connected causative factor in his death" (162, 163).

There is not one line, indeed not one word, of proof to establish that pneumoconiosis had one thing in the world to do with the death of Walter Wilkerson. The testimony of Dr. Paul O. Wells, given over the objection of the defense, that pneumoconiosis "could have been" a contributory cause of death (135) does not, standing alone, rise above *possibility,* and this is especially true when that testimony is considered in light of Dr. Wells' answers to the following questions:

> "4. Doctor, but it was your opinion I believe, as testified earlier, that the cause of the atelectasis was probably bronchular obstruction due to bronchogenic carcinoma?
>
> A. That is true.

5. Doctor, would bronchogenic carcinoma be competent producing cause of death in this case?

A. It would.

6. You are not able to tell from looking at the x-ray films alone exactly what caused the death?

A. I am not.

7. This man could have been killed in a car wreck as far as your x-ray films show, couldn't he?

A. That's true.

8. Doctor, you are not able to say what if any physiological disability that this man had from his pneumoconiosis are you?

A. I am not" (136).

Dr. Wells would not, could not and did not express an opinion that pneumoconiosis or any other condition caused death. He had no basis on which to express such an opinion. He could not even tell whether pneumoconiosis was causing any physiological disability, let alone contributing to cause death. Any physician could look at the same films and say that pneumoconiosis "could" have contributed to death, but no competent physician would on the basis of x-ray films express the opinion that pneumoconiosis did in fact probably contribute to death in this or any other case.

Testimony raising no more than the possibility of causal connection simply will not support an award any more than it would support a finding in a case at common law. In *Marcum* v. *General Electric Company,* Ky., 479 S. W. 2d 640 (1972) the Court said:

> "The mere possibility of the causal relationship is insufficient to support an award."

In *Roberts* v. *Lowery*, Ky., 379 S. W. 2d 235 (1964) the Court said it in these words:

> "Liability cannot be imposed when based on conjecture or surmise."

Again the Court said in *Parker Seal Company* v. *Russell*, Ky., 487 S. W. 2d 280 (1972):

> "A possibility of causal connection is not enough to support a finding of such connection as a fact."

Claimant also cites *Ausmus* v. *Smith*, 311 Ky. 478, 224 S. W. 2d 685 (1949) for the proposition that medical testimony need go no further than to say that a condition "could" have resulted from an injury. While the language in that case would be subject to serious question under more recent cases cited herein, still the context of that language is such that it might be acceptable even today. The Court said:

> "*Under the evidence above,* it cannot be said that there was no proof to show that the condition resulted from the assault. It was not necessary for the *medical* testimony to go further than to say that such condition could have resulted from the injury. *Certainly the evidence of the grandfather, the father, and the mother as to the condition prior to the assault and battery, and the condition following it, was ample evidence to show that, most likely, the condition resulted from the injury.*"

Thus the Court said in *Ausmus* that the lay facts alone amply establish that "the condition resulted from the injury" and *under that kind of evidence* the medical testimony did not have to go further than to

say that such condition could have resulted from the injury. That is not the situation in the case at bar.

Here the only physician to testify had nothing but x-ray films. He admitted that the employee could have been killed in a car wreck as far as his x-ray films show and that he would not even be able to say whether the employee's pneumoconiosis was producing physiological disability (136). There would simply be no basis for an opinion by Dr. Wells that pneumoconiosis contributed to death even if Dr.Wells had couched that opinion in terms of probability rather than possibility.

In *Smyzer* v. *B. F. Goodrich Chemical Company,* Ky., 474 S. W. 2d 367 (1971) the evidence was much more favorable to the claimant than the evidence in the case at bar but the Court, affirming the circuit court's reversal of the Workmen's Compensation Board, said:

> "Although a court cannot substitute its evaluation of the weight and credibility of the evidence for that of the Workmen's Compensation Board, nevertheless, the findings of fact of the board when it decides in favor of the claimant must be supported by substantial evidence. Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men. See O'Nan v. Ecklar Moore Express, Inc., Ky., 339 S. W. 2d 466."

Likewise in *Hornsby* v. *International Harvester Company,* 310 Ky. 208, 220 S. W. 2d 401 (1949) the Board awarded death benefits on the basis of the flim-

siest of "evidence," which was indeed no substantive evidence at all, and the Court, affirming the circuit court's reversal of the Board, said:

> "Clearly the burden is on the employee or his representatives to establish the basic conditions of liability, and a finding against the employer must rest upon evidence of sound probative character."
>
> * * * * * * *
>
> "While the Workmen's Compensation Act should be construed liberally in favor of the employee and his representatives, there must be *evidence* to support the award."

The Death Certificate filed as an exhibit to the compensation claimant's testimony before the Board's Hearing Officer (55) does not even mention pneumoconiosis, but it does show that death was due to cardiorespiratory failure as a consequence of metastatic carcinoma of the lungs of three months' duration. The first space of Part II of the Death Certificate specifically provides for the following information:

> "PART II. Other significant conditions: Conditions contributing to death but not related to cause given in Part I (a)."

Again, however, pneumoconiosis is not mentioned there or elsewhere in the Death Certificate.

Referring to certified copies of records, including records of death, *KRS* 213.190(1) provides in part as follows:

> "Any such certified copy shall be prima facie evidence of the facts therein stated."

The statute gives a certified copy of the Death Certificate such probative value that a prima facie case can be made thereby, as stated by the Court in *Nally, Ballard & Saltsman* v. *Richards,* Ky., 248 S. W. 2d 918 (1952):

> "It is insisted that the introduction of the death certificate was incompetent, aside from which there was no evidence of substance as to the cause of death. Obviously, appellant has overlooked a number of cases wherein it has been held that an attested copy of death certificate may be introduced in evidence to show cause of death and is prima facie evidence of that fact. Louisville Gas & Electric Co. v. Duncan, 235 Ky. 613, S. W. 2d 915; Fidelity Mut. Life Ins. Co. v. Hembree, 240 Ky. 97, 41 S. W. 2d 649; Kentucky Home Mut. Life Ins. Co. v. Watts, 298 Ky. 471, 183 S. W. 2d 499; Marion v. Frank R. Messers & Sons, 306 Ky. 743, 209 S. W. 2d 321."

Numerous other cases attesting to the probative value of a certified copy of the Death Certificate are cited in the annotation to *KRS* 213.190(1).

Failure of the Death Certificate to show pneumoconiosis as a contributory cause of death in the space on the Death Certificate specifically designated for that purpose is affirmative evidence that pneumoconiosis did not contribute to cause death, although such affirmative evidence is superfluous, since there was no evidence to establish that pneumoconiosis did contribute to cause death.

The record in this case speaks volumes. The taking of claimant's proof began with a hearing March 26,

1971 (44, 53), at which time claimant was given thirty additional days within which to complete proof by deposition (43, 53). *Subsequently claimant filed thirty-five motions for extension of time!* All of these motions were sustained, and the last order of the Board allowing claimant time was rendered December 10, 1973, allowing claimant until and including January 11, 1974, to complete proof by deposition (123). That order concluded with the words:

"Last extension of time for plaintiff" (123).

Thus nearly three years and thirty-five motions after claimant testified, her time for proof finally expired, and during that time no one testified except the claimant herself and a radiologist who presumably has never even seen the deceased, has read only x-ray films, and could express no opinion about physiological disability, if any, let alone the cause of death!

CONCLUSION

It is believed that this Court should without hesitation affirm the Judgment of the Harlan Circuit Court.

Respectfully submitted,

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